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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2487/2014*, **

Communication submitted by:	N.D.J.M.D. (represented by counsel, Joseph W. Allen)
Alleged victim:	The author
State party:	Canada
Date of communication:	27 November 2014 (initial submission)
Document references:	Decision taken pursuant to rules 92 and rule 97 of the Committee's rules of procedure, transmitted to the State party on 2 December 2014 (not issued in a document form)
Date of adoption of Views:	8 November 2017
Subject matter:	Removal to Sri Lanka
Procedural issues:	Admissibility; exhaustion of domestic remedies; insufficient substantiation of claims
Substantive issues:	Right to life; torture, cruel, inhuman or degrading treatment or punishment
Articles of the Covenant:	6 (1), 7 and 9 (1)
Articles of the Optional Protocol:	2, 3 and 5

1.1 The author is N.D.J.M.D, a national of Sri Lanka born on 17 February 1982 and currently residing in Canada. The author is subject to removal to Sri Lanka, following the rejection of his application for refugee status in Canada. The removal to Sri Lanka was scheduled for 5 December 2014. The author claimed that his rights under articles 6 (1), 7 and 9 (1) of the Covenant would be violated if Canada were to proceed with his forcible removal. The Optional Protocol entered into force for the State party on 19 August 1976. The author is represented by counsel, Joseph W. Allen.

1.2 On 2 December 2014, pursuant to rule 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim

* Adopted by the Committee at its 121st session (16 October–10 November 2017).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelić, Bamariam Koita, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. Pursuant to rule 90 of the Committee's rules of procedure, Marcia V.J. Kran, member of the Committee, did not participate in the examination of the communication.

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measures, requested the State party to refrain from removing the author to Sri Lanka while his case was under consideration by the Committee.

1.3 On 3 July 2017, the Committee, acting through its Special Rapporteur on new communications and interim measures, denied the State party's request to lift the interim measures.

The facts as presented by the author

2.1 The author indicates that he used to work as a cook and as a sailor in Sri Lanka. On 30 May 2011, he was present at a demonstration in the "free trade zone" area, along with his girlfriend and his cousin, R.C., who were working in the area. The police suddenly started shooting at the demonstrators and his cousin was killed. The author witnessed his cousin's death during the shootout. The author arranged for an ambulance to take his cousin to hospital, but it was too late and he died.[1]

2.2 The author provided eyewitness evidence to the trade union leaders of the free trade zone companies, who had decided to take legal action against the police for the deadly attack. The Catholic priest of the area also made a complaint to the Asian Human Rights Commission.[2]

2.3 On 10 June 2011, the author started receiving threats by telephone telling him to stop his "activities against the Government and the police". He ignored these threats as he wanted to bring his cousin's murderers to justice.

2.4 On 28 June 2011, four men forcibly entered the author's home, beat him, tied him up and blindfolded him. They took the author to another location and questioned him about the information he had given to the trade union lawyers. During his detention, the author was verbally abused and beaten until he lost consciousness. When he regained consciousness, the author found himself in a three-wheeler taxi, whose driver had found him on the side of a road and drove him home.

2.5 The following day, the author's parents took him to the Negombo hospital. They were told that the author should have filed a complaint to the police prior to going to the hospital. Thereafter, the author decided to visit an indigenous medical doctor.[3]

2.6 The author's father hired a lawyer to represent his son. When the lawyer contacted the Sri Lankan police, he was told that the author's life would be in danger should he stay in Sri Lanka. The author's father decided to send him to Kandy to stay with family members. He then paid a "private ship" to take the author to Algeria, where he joined a ship sailing to Canada.

2.7 On 27 November 2011, the author arrived in Canada and on 1 December he left the ship with the intention of filing a claim for asylum. He waited for the ship to leave the port, fearing that he would be forced to return on it. On 16 December, he submitted his claim for international protection. However, the captain of the ship had already notified the Canadian authorities of the author's absence and an exclusion order was issued against him in abstentia on 13 December, making him ineligible to claim refugee protection.[4] On 6 March 2012, the author was notified by a Canada Border Services Agency officer that his refugee claim was inadmissible.

2.8 The author filed an application for leave to seek judicial review at the Federal Court of the decision. On 20 September 2012, the leave application was granted and a hearing was scheduled for 11 December.

[1] Author's statement filed with his pre-removal risk assessment, 20 September 2012.

[2] Ibid.

[3] The author provided a handwritten medical certificate in the form of a brief note, stating that the author was treated from 1 to 7 July 2011 "for his physical injuries due to swelling".

[4] The State party explains that, according to section 223 of the Immigration and Refugee Protection Regulations, an exclusion order is a type of removal order, and such an order was issued in the present case pursuant to subsections 44 (2) and 228 (1) (c) (v) of the Regulations.

2.9 On 3 January 2013, the Federal Court allowed the application for judicial review, setting aside the exclusion order and sending the matter back for re-examination by a different officer. The decision was appealed by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness of Canada. On 10 January 2014, the Federal Court of Appeal dismissed the author's judicial review application and set aside the January 2013 decision of the Federal Court.

2.10 On 12 March 2014, the author filed an application for leave to appeal the decision of the Federal Court of Appeal before the Supreme Court of Canada. On 12 June, his request was dismissed.

2.11 On 29 August 2014, the author's pre-removal risk assessment application was dismissed. The author complains that his application was examined solely through written submissions and that the officer analysing his application did not assess his credibility and story in person. The evaluation of fear was made by an officer of Citizenship and Immigration Canada and not by a member of the Immigration and Refugee Board. The author explains that the officer who rendered the negative decision referred to the absence of original documents. The author had some of the original documents, and he submits that he could have presented them had he been given an opportunity to participate in an oral examination of his application.

2.12 On 26 November 2014, the author filed an application for leave before the Federal Court to seek judicial review of the negative pre-removal risk assessment decision and requested a judicial stay of his removal. The author claims that the Federal Court had not yet rendered a decision on these requests by the time the complaint was submitted to the Committee, but that he could be removed at any time. Domestic remedies were later exhausted.[5]

The complaint

3.1 The author claims that his deportation to Sri Lanka would constitute a violation of his rights under articles 6 (1), 7 and 9 (1) of the Covenant. He contends that he faces great danger should he be sent back to Sri Lanka. Referring to various public reports and guidelines, the author submits that the situation in Sri Lanka is extremely dangerous for individuals showing any kind of opposition to governmental authorities.[6] He has already been targeted and beaten until he lost consciousness for having testified against the Sri Lankan police. As the only eyewitness to his cousin's murder, the author was persecuted for wishing to file a complaint against the police. In addition, the author submits that even after his departure, his family continued to receive telephone threats that he would be killed if he was ever seen in the area.

3.2 According to the author, his claim was corroborated in a report by Schweizerische Flüchtlingshilfe in 2012, as follows:

> In Sri Lanka, doctors often refuse to treat the victims of torture, who then, fearing other ill-treatment, are reluctant to go to public hospitals. That is why many of them consult private doctors. In Sri Lanka it is rare for victims of torture to lodge a complaint, because that would require a certificate issued by State doctors. Those who do so are put under pressure by the public prosecutors, who make every effort to get them to withdraw their complaint.[7]

The same report states that "according to what has been said by a number of observers, persons returning to Sri Lanka are regarded as traitors who have discredited Sri Lanka abroad. It must therefore be assumed that they are an at-risk group. There is admittedly no

[5] See paras. 4.6, 5.1, 6.1, 6.4, 8.1 and 8.2.

[6] Amnesty International, *Annual Report for Sri Lanka, 2013*, available from www.amnesty.org/en/region/sri-lanka/report-2013; Office of the United Nations High Commissioner for Refugees (UNHCR), Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka (HCR/EG/LKA/12/04), 21 December 2012.

[7] Schweizerische Flüchtlingshilfe, "Sri Lanka: current situation: update", pp. 10–11 (official translation). Available from www.refworld.org/pdfid/5243f5dfa.pdf.

evidence that all returnees are abducted, arrested and tortured in a systematic way. However, there are a number of reports which document cases and show the risk."[8]

3.3 Finally, the author submits that the Canada Border Services Agency officer decided that his refugee claim was inadmissible although he had explained his situation and the reasons why he only claimed refugee protection 20 days after his arrival in Canada. He submits that he was never given an opportunity to explain his fear of persecution during an oral hearing, and that his story and the credibility of his claims were therefore never evaluated in person. The author states that the Agency erred in issuing an exclusion order against him so quickly and in abstentia, thereby breaching the principle of natural justice given the serious consequences of the removal order on his ability to claim refugee protection.

State party's observations on admissibility and the merits

4.1 On 6 November 2015, the State party submitted its observations on the admissibility and merits of the communication. The State party argues that the author's communication is inadmissible for non-exhaustion of effective and available domestic remedies and for non-substantiation. Concerning the author's allegations under article 9 (1) of the Covenant, the State party submits that they are incompatible *ratione materiae*.

4.2 The State party submits that the author has not exhausted all available domestic remedies as he failed to make an application for permanent residence on humanitarian and compassionate grounds and he did not provide any explanation for his failure to do so, while this remedy offered him a reasonable prospect of redress.

4.3 The State party explains that the humanitarian and compassionate application and process is an important domestic remedy and regrets the Views of the Committee in some recent cases in which it determined that the humanitarian and compassionate application was an ineffective remedy that did not need to be exhausted for the purposes of admissibility. It argues that the humanitarian and compassionate process is a fair administrative procedure, subject to judicial review, that can result in an applicant being allowed to remain in Canada. The author has not raised any objections to the humanitarian and compassionate process and has not provided any evidence to substantiate that it would be ineffective or unfair in his particular case.

4.4 Concerning the author's allegation that his removal to Sri Lanka would violate the State party's obligations under article 9 (1) of the Covenant, the State party submits that the author does not specify how his rights under this article would be violated. It also considers that his allegations are incompatible with the scope of the State party's obligations under article 9 (1), which does not impose an obligation on States parties to refrain from removing individuals who face a real risk of arbitrary detention in the receiving State.

4.5 The State party also submits that the author has not substantiated, on even a prima facie basis, his allegations of a real risk of irreparable harm upon return to Sri Lanka. It notes that the author alleges that he would face a risk of irreparable harm in Sri Lanka on two bases: (a) for being witness to human rights violations by the Sri Lankan authorities because, in 2011, he witnessed and provided information about the murder by Sri Lankan police of R.C, his cousin; and (b) for returning to Sri Lanka after a long time abroad, therefore being considered as a traitor who has discredited Sri Lanka. In support of his claims, the author relies on risk profiles set out in two reports.[9]

4.6 The State party states that the author's claims have been rejected by the competent authorities. After reviewing the author's pre-removal risk assessment application and supporting evidence, the assessment officer concluded that the author had not provided sufficient evidence to corroborate his allegations of risk. The assessment officer found that there was insufficient evidence linking the author to R.C. and corroborating his participation in the demonstration during which R.C. was killed, or his involvement in the legal actions which followed. The State party reports that the Federal Court upheld the

[8] Ibid., p. 19.
[9] See para. 3.2.

assessment officer's decision after a thorough review of the author's evidence and arguments.

4.7 The State party recalls the Committee's consistent jurisprudence that "important weight should be given to the assessment conducted by the State party" and submits that the Committee should therefore follow the findings of the assessment officer and the Federal Court.[10] The State party adds that the author has not provided evidence to demonstrate that the conduct of the proceeding at issue or the evaluation of the facts and evidence was manifestly arbitrary or amounted to a denial of justice.

4.8 The State party considers that, throughout the years, the author's accounts of his experience prior to his departure from Sri Lanka in 2011 contain numerous inconsistencies and that the Committee should therefore not rely on them, or should consider that the author's allegations are insufficiently substantiated. In this connection, the State party argues that the letters and news articles provided by the author do not support his claims: none of the letters mention that the author was present at the Katunayake Free Trade Zone demonstration or that he witnessed the death of R.C., or provided evidence in that regard. Similarly, none of the news articles mention the author, not even the article posted on the World Socialist Web Site dated 23 June 2011, which provides detailed information about a judicial inquiry and a police investigation that were taking place at the time the article was published, and which includes the names of a number of people who participated in the demonstration and who provided testimony to the Negombo Magistrate Court in charge of the investigation.[11]

4.9 The State party also submits that in his May 2012 affidavit, which constitutes the author's first statement to the State party's authorities about what happened to him in Sri Lanka, the author did not mention that he had been present at the Katunayake Free Trade Zone demonstration and that he had witnessed his cousin's murder, or that he had provided evidence about the murder. Instead, the author stated that he and others had signed a petition which they gave to their priest to file with the Asian Human Rights Commission as part of a protest against the police who killed his "close family member", after which he and other petitioners were targeted by government goons and the police. The author did not identify the "close family member" as R.C. or that he was his cousin.

4.10 Regarding the author's claim that he witnessed the death of R.C. during the police shootout and that he arranged for an ambulance to take R.C. to the hospital but that it was too late and that he therefore died, the State party submits that, in the 23 June 2011 article, it is reported that an individual referred to as S.F. and a colleague took R.C. to the factory and that the police came and took him a way in a jeep. R.C. was apparently left untreated and bled for two hours in police custody before being taken to the hospital where he died two days later. Another World Socialist Web Site article, dated 6 June 2011, reports these same details.[12]

4.11 Concerning the author's claim that he was "the only eyewitness" to the murder, the State party submits that, in the personal narrative he provided as part of his pre-removal risk assessment application in 2012, he described himself as "one of the few eyewitnesses". In the State party's view, even if the author was a witness to the murder of R.C., he was not the only one: at the very least, the victim's girlfriend was also a witness, as were S.F. and his colleague, and the other people mentioned in the 23 June 2011 article. Given the large number of people that were reportedly at the demonstration, the State party submits that there were probably many witnesses to the shooting. Referring to an article dated 4 July 2012 in *The Island*, the State party reports that, apparently, 270 demonstrators were

[10] See, for example, communication No. 2007/2010, *X. v. Denmark*, Views adopted on 26 March 2014, para. 9.3.

[11] W.A. Sunil and Ruwan Liyanage, "Sri Lankan court examines police shooting of FTZ worker", World Socialist Web Site, 23 June 2011.

[12] "Thousands attend funeral of slain Sri Lankan FTZ worker", World Socialist Web Site, 6 June 2011.

hospitalized and 11 fundamental rights actions were filed in the Sri Lanka Supreme Court against the police.[13]

4.12 The State party indicates that the author has never provided copies of the evidence he allegedly provided to the trade union leader who decided to take legal action against the police force. The State party argues that the author does not seem to have had any involvement in the judicial inquiry or the police investigation, which started while the author was still in Sri Lanka.[14] The State party highlights that there is no mention in the author's May 2012 affidavit of his having provided evidence to trade union lawyers or testimony in support of a complaint.

4.13 Regarding the author's claim that on 10 June 2011 he started to receive threatening telephone calls at home, the State party notes that, in the personal narrative he submitted as part of his pre-removal risk assessment application, the author only stated that his mother had received one threatening phone call on that date, but made no reference to having received other threatening calls. Additionally, the author's May 2012 affidavit does not mention any threatening phone calls.

4.14 The State party maintains that the author provided inconsistent information in regard to the medical treatment he received the day after he was abducted and beaten. In his submission to the Committee, he states that his parents took him to Negombo hospital, where he was refused treatment and, as a result, his parents took him to the Keraminiya clinic. According to the document which the author refers to as a medical note, he received treatment from 1 to 7 July 2011 for physical injuries due to swelling. However, in his May 2012 affidavit, the author swore that after the 28 June 2011 attack he was hospitalized overnight; there is no mention of the hospital refusing to treat him or that he had to go to the Keraminiya clinic.

4.15 The State party also submits that the author has provided inconsistent information regarding how he obtained employment on the ship that took him to Canada. In his submission to the Committee, he claims that his father took him to family members in Kandy and paid a private ship to take him to Algeria where he joined a ship sailing to Canada. According to his pre-removal risk assessment application form, the author flew from Sri Lanka to Algeria on 11 July 2011, in possession of a valid Sri Lankan passport and other identification documents. Based on his Seafarer Record Book, the author arranged his employment with the *M/V Lake Ontario* on 13 June 2011 in Colombo. According to the employment contract he signed on 8 July 2011, the author agreed to take up his position with the *M/V Lake Ontario* on 11 July 2011. The State party submits that while a pre-removal risk assessment application is not a sworn document, the author signed a declaration attesting that the information on the form and in support of his application was "truthful, complete and correct".

4.16 Even if the Committee were to accept the author's account as true, which the State party urges it not to do, the author has not provided sufficient evidence to substantiate that the alleged perpetrators of the incidents on 10 and 28 June 2011 were Sri Lankan government officials or the police; he never identifies them, but only refers to them as "the caller" and "four men". Additionally, the author never claims that he fears persecution by the Sri Lankan authorities but merely states that "he is facing a great risk of danger should he be sent back to Sri Lanka which is evident from the flagrant violation of fundamental human rights still occurring in Sri Lanka today …".

4.17 The State party considers that the author intends the Committee to infer that his alleged persecutors were either Sri Lankan authorities or acting on their behalf, but does not provide any evidence in that regard. According to the State party, the threat that the author

[13] Lal Gunasekera, "Report on Katunayake police shooting still not released — unionists", *The Island*, 4 July 2012. In an article entitled "Police brutality mindless, indiscriminate and excessive: petitioners" appearing in the *Sunday Times* (Sri Lanka) on 11 March 2012, it was reported that about 14 petitioners had filed fundamental rights actions as a result of injuries they sustained during the demonstration and that the injured petitioners included workers participating in the demonstration and bystanders, many of them mentioned by name.

[14] Sunil and Liyanage, "Sri Lankan court examines police shooting of FTZ worker".

allegedly faced in 2011 was perpetrated by local actors. It is therefore likely that upon his return to Sri Lanka, the author would have a viable internal flight alternative, as demonstrated by the fact that the author was able to stay in Kandy for a number of weeks without incident prior to leaving for Algeria, and that his parents and sisters have relocated. The State party further submits that, based on the Eligibility Guidelines issued by the Office of the United Nations High Commissioner for Refugees (UNHCR) in 2012 and the new legislation designed to protect witnesses of human rights violations, the author would be able to access State protection from any local non-State entities that may seek him out upon return.

4.18 The State party further submits that, according to the Eligibility Guidelines, not all persons who may have characteristics consistent with risk profiles are entitled to international protection.[15] The majority of examples cited in the Guidelines refers to individuals who were victimized by Sri Lankan authorities and who sought redress for their victimization or were witnesses who testified before the Lessons Learnt and Reconciliation Commission. The Guidelines also state that both perceived political opinion and race are important additional characteristics to be taken into account.[16]

4.19 The State party submits that this is consistent with the findings of the Upper Tribunal (Immigration and Asylum Chamber) of the United Kingdom of Great Britain and Northern Ireland in *G.J. and others*[17] that the focus of the Sri Lankan Government has changed since the civil war ended and is now on those individuals who put the stability and unity of Sri Lanka at risk, in particular members of the Liberation Tigers of Tamil Eelam (LTTE) or similar Tamil separatist organization. The "perceived political opinion" in the 2012 Eligibility Guidelines refers to political opinions supporting the destabilization of Sri Lanka or separatism. The author therefore does not fall within the definition of "witness to human rights violations" as understood in the Guidelines.

4.20 In addition, the State party submits that on 19 February 2015, the Sri Lankan Government enacted legislation designed to provide witnesses and victims with protection and assistance.[18] It further argues that the situation in Sri Lanka has improved since 2015, given that President Maithripala Sirisena has undertaken to work towards reconciliation of all ethnicities and religions according to the recommendations of the Lessons Learnt and Reconciliation Commission. Since the new Government came into office, journalists, media professionals and human rights activists have more freedom to express themselves and talk in public in a safe working environment.

4.21 The State party submits that, according to the press articles referred to by the author, the actions of the police which resulted in the death of R.C. were widely publicized and severely criticized. It considers that the mere fact that the author may have witnessed and provided information about the murder of R.C. in 2011 is not sufficient to demonstrate that he would be at a real and personal risk of irreparable harm upon his return to Sri Lanka.

4.22 Regarding the author's claim that he will be at risk of irreparable harm if he is returned to Sri Lanka because he will be regarded as a traitor who discredited Sri Lanka abroad, the State party submits that the Schweizerische Flüchtlingshilfe report on which he relies points out that "there is admittedly no evidence that all returnees are abducted, arrested and tortured in a systematic way".[19]

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[15] The Eligibility Guidelines specifically recognize that "certain witnesses of human rights violations and victims of human rights violations seeking justice", a category with which the author appears to identify, may require international refugee protection depending on the individual circumstances of their cases. According to the Guidelines, this category involves persons seeking justice after mistreatment by the police, given that there have been allegations that such people have reportedly been harassed and received threats in an attempt to make them withdraw their complaints. Depending on the individual circumstances of a given case, persons with this profile are likely to be in need of international refugee protection "on account of their (perceived) political opinion".

[16] UNHCR, Eligibility Guidelines, p. 32.

[17] Available from www.refworld.org/pdfid/51da951c4.pdf.

[18] "Sri Lanka parliament enacts witness protection law", Jurist, 20 February 2015, available from http://jurist.org/paperchase/2015/02/sri-lanka-enacts-witness-protection-law.php.

[19] Schweizerische Flüchtlingshilfe, "Sri Lanka: current situation", p. 19.

4.23 The State party argues that while objective reports indicate that many returnees undergo security screening by immigration officials or members of the State Intelligence Service upon returning to Sri Lanka, in the absence of significant links to LTTE, other groups acting in opposition to the Government, outstanding court orders or arrest warrants or otherwise being on a "stop" or "watch" list, such verifications would not normally create a real and personal risk of irreparable damage.[20] According to the information provided by the author, the Sri Lankan authorities did not attempt to prevent him from leaving the country in 2011 and he left with a valid passport. There is also no indication that the author is the subject of a court order or arrest warrant, or is otherwise on a "stop" or "watch" list.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 25 January 2016, the author submitted his comments on the observations of the State party. He states that on 9 December 2015, he filed an application for permanent residence in Canada based on humanitarian and compassionate grounds. He also claims that his application for a judicial stay before the Federal Court was discontinued by means of a motion dated 4 December 2014 following the Committee's request to the State party to refrain from deporting the author to Sri Lanka while his case was under consideration.

5.2 Concerning the State party's submission that the author's allegations under article 9 (1) do not fall within the scope of the Covenant, the author argues that the State party has the obligation not to deport or remove an individual to a country or region where he or she would face a real risk of irreparable harm

5.3 The author submits that he was not able to claim refugee protection before arriving in the State party. He explains that, as mentioned in his affidavit of May 2012, the ship on which he was working was docked for very short periods of time prior to its arrival in Canada and that, due to his work on the ship, he was not able to leave the vessel until they had arrived in Canada.

5.4 Regarding the State party's submission that the pre-removal risk assessment officer determined that insufficient evidence was provided to demonstrate that the author had been detained and tortured by Sri Lankan authorities, he explains that he had no way of demonstrating this fact through documentary evidence. He states that the Sri Lankan authorities would clearly not issue any documentation regarding unlawful detention or torture of civilians by those same authorities. The author states that he is "unsure" how the State party could expect him to demonstrate this matter other than through direct questioning, when his testimony could be properly evaluated, as is the case during refugee hearings, especially on issues central to the decision made.[21]

5.5 The author also refers to the Committee's Views in *Choudary v. Canada*, in which it observed that

> because of his apparent failure to establish his identity at the initial stage of the procedure, the author was not given any further opportunity, in the framework of the Immigration and Refugee Board, to have his refugee claim assessed, even though his identity was later confirmed. While the author's claim that he faced a risk of being tortured and of suffering threats to his life was assessed during the [pre-removal risk assessment] procedure, [the Committee considered that] such limited assessment could not replace the thorough assessment that should have been performed by the Immigration and Refugee Board. Notwithstanding the deference given to the

[20] UNHCR, Eligibility Guidelines, p. 5; Council of State of the Netherlands, *X. v. State Secretary for Security and Justice* (case No. 201400058/1/V2), decision of 20 June 2014, unofficial translation by UNHCR available from www.refworld.org/docid/53d89aa44.html; Refugee Review Tribunal of Australia, case No. 1304427, decision of 11 October 2013, para. 47.

[21] Section 167 of the Immigration and Refugee Protection Regulations states: "For the purpose of determining whether a hearing is required under paragraph 113 (b) of the Act, the factors are the following: (a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act; (b) whether the evidence is central to the decision with respect to the application for protection; and (c) whether the evidence, if accepted, would justify allowing the application for protection."

immigration authorities to appreciate the evidence before them, the Committee [considered] that further analysis should have been carried out in this case.[22]

5.6 As to the State party's argument that the author would benefit from State protection given that the Sri Lankan Government has recently enacted legislation to provide protection and assistance to witnesses and victims of crime, the author argues that the adoption of new legislation does not demonstrate its effectiveness. Even if the Sri Lankan Government had the best intentions, the enacted legislation does not guarantee the independence of the new authority responsible for its implementation.

5.7 Finally, the author reports that he is attempting to obtain documentary evidence from Sri Lanka to corroborate his claims.

State party's additional observations

6.1 On 18 August 2016, the State party submitted additional observations on the admissibility and merits of the communication and reiterated its request to lift the interim measures. The State party reports that, after careful consideration, the author's application for permanent residence in Canada based on humanitarian and compassionate grounds was denied on 15 July 2016. In doing so, the humanitarian and compassionate officer commended the author for the efforts he had made to establish himself in Canada, but noted that his establishment did not go beyond what would be expected of someone who has been in the country for almost five years.

6.2 The State party explains that the humanitarian and compassionate officer did not accept the author's claim that he would face hardship in Sri Lanka as a result of the events that took place there in May and June 2011. The officer reiterated that the documentary evidence provided by the author, consisting of various news articles, did not support his claims that he had been the only witness to the shooting of R.C. and that he had testified to what he had allegedly observed. As a result, the officer did not give any weight to the author's statement that he will be targeted by Sri Lankan authorities because of his alleged testimony. The officer also noted that the author had not provided any evidence to support his claim that he would be discriminated against when applying for employment in Sri Lanka because he was a young individual with no family or political connections, as the author has a significant history of previous employment in Sri Lanka.

6.3 The officer concluded that, while there would be a period of adjustment for the author to re-establish himself in Sri Lanka, he would be able to do so with the support and assistance of his family and friends. The officer was not satisfied that the humanitarian and compassionate considerations in relation to the author justified an exemption from the requirements of the Immigration and Refugee Protection Act.

6.4 The State party also states that on 5 August 2016, the author applied to the Federal Court for leave to seek judicial review of the humanitarian and compassionate decision.[23]

6.5 The State party submits that the author has not yet specified how his rights under article 9 (1) would be violated if he were deported to Sri Lanka, nor has he provided any evidence to demonstrate an alleged violation. The State party argues that the author has not substantiated, on even a prima facie basis, his allegations of a real risk of a violation of article 9 (1) upon return, or that the necessary and foreseeable consequence of such a violation would amount to a violation of articles 6 (1) or 7.

6.6 Concerning articles 6 (1) and 7, the State party explains that contrary to the author's assertion, the pre-removal risk assessment officer did not require him to provide "direct" documentary evidence from Sri Lankan authorities to prove that he had been detained and tortured by those authorities. However, the officer found that the author had not provided sufficient evidence to demonstrate that he had been present at the protest in the Katunayake Free Trade Zone, that he was related to R.C., that he was the only eyewitness to the

[22] See communication No. 1898/2009, *Choudary v. Canada*, Views adopted on 28 October 2013, para. 9.6.

[23] The State party does not provide further information.

shooting and that he had provided testimony in the lawsuits against the Sri Lankan authorities.

6.7 The State party submits that the author's mischaracterization of the officer's findings is in aid of his continued attempts to have the Committee act as a fourth tribunal to secure an oral hearing of his pre-removal risk assessment application. The issue of whether the author is entitled to an oral pre-removal risk assessment hearing has been thoroughly considered by domestic authorities, who rejected his position.[24] The State party considers that the author's claim that he cannot demonstrate the truth of his allegations other than through direct questioning is not well founded. It is not accurate to conclude that allegations of detention and torture (or allegations of a risk of detention and torture) can only be proven through direct questioning at an oral hearing.

6.8 The State party argues that the difficulty the author is experiencing in bringing forward sufficient, probative and credible evidence to substantiate his allegations could be due to the fact that the evidence that he has brought to the Committee's attention, or that could still be brought to the Committee's attention, does not support his allegations. For instance, had the author been involved with the 30 May 2011 incident in the manner he claims, one would expect that his name would have been noted in at least some of the news articles and that he would be able to obtain a transcript of his testimony or, at the very least, that he would be able to obtain verification by the trade union lawyers of his cooperation. The State party also submits that, had the author been tortured in the manner he claims, he would have been able to produce medical records to verify his injuries and the type of medical treatment he received. Instead, he provided the Committee with an undated, handwritten message on plain paper, which he claims is a medical note.

6.9 As to the author's reference to *Choudhary v. Canada*, the State party considers that it does not apply to the present case. Would the Committee consider to the contrary, the State party expresses its disagreement with the majority view and considers that it goes against the Committee's established jurisprudence, and should therefore not be followed.

6.10 Concerning the author's argument questioning the effectiveness of the new Sri Lankan legislation designed to protect and assist witnesses and victims of crime, the State party requests the Committee to consider the issue of the new legislation in the context of the State party larger point, which is that the political situation in Sri Lanka appears to have been improving since the January 2015 elections. The adoption of witness protection legislation is an example of the potential improvement.

Author's comments on the State party's additional observations

7.1 In his comments of 19 September and 24 October 2016, the author maintains that a hearing should have been held in the framework of his pre-removal risk assessment application as the documentary evidence he submitted raised issues as to his credibility, which was central to the officer's decisions, and that a positive decision would have been adopted if the evidence referred to had been given sufficient probative value.[25]

7.2 The author agrees with the State party that in certain situations, allegations of torture and persecution can be proven through documentary evidence alone. However, he explains that he has been unable to obtain such documentation, and should therefore have been given the opportunity to present his claim in person and testify to what he witnessed and suffered since his cousin's death.

7.3 The author provides a letter from N, a member of the Free Trade Zone and General Services Employees Union, stating that the author was instrumental in the legal action the Union filed against the police: "We could not find many eyewitness(es) for our motion because of the threats that come through police and unknown forces. However, [the author] came forward to help us clarify the death of our union worker. I would like to mention that without his support, we [would have been] unable to make our legal document." N also states that the Government has not yet issued the report which contains evidence regarding

[24] Section 167 of the Immigration and Refugee Protection Regulations.

[25] Ibid. See para. 6.7.

the death of R.C. The author also provides an online article reporting that the Inter-Company Employees Union requested the Government to issue the committee report on the death of R.C., and a copy of the Facebook page of the Union.[26]

7.4 The author also provides a letter from his priest, who conducted the funeral services for R.C., stating the following: the author was present when R.S., a cousin on his mother's side, was shot by the police in May 2011 and he was an eyewitness to the incident, which created a huge political upheaval in the area. Many had their lives threatened by unidentified government forces and police. The author was one of the young men who was directly involved. This incident truly affected his life to the point that he had to leave Sri Lanka. He was trying to get the necessary documents to prove that he witnessed the incident, but it is really difficult because the Government itself is hiding a lot of the necessary evidence.

7.5 Finally, the author disagrees with the State party's statement that the situation in Sri Lanka seems to have improved. In this connection, he refers to a 2015/16 country report published by Amnesty International stating that "many human rights challenges remained, including persistent use of arbitrary arrest and detention, torture and other ill-treatment, enforced disappearances and deaths in custody and a long-standing climate of impunity for these and other violations".[27]

Additional observations

From the State party

8.1 In its supplemental submission dated 16 March 2017, the State party reports that on 18 November 2016, the Federal Court granted the author's application for leave to seek judicial review of the decision rejecting his application for permanent residence based on humanitarian and compassionate considerations. The author provided the Federal Court with an affidavit, sworn on 2 September 2016, in support of his application for judicial review.

8.2 The State party submits that the hearing took place on 13 February 2017. On 22 February, the Federal Court determined that the author's arguments, according to which the humanitarian and compassionate officer had erred in his assessment of his hardship if returned to Sri Lanka and his degree of establishment in Canada, were not founded in fact and law. It therefore dismissed the author's application for judicial review. Regarding the issue of the author's establishment in Canada, the Federal Court found that the officer's reasoning was clear, transparent and obviously supported by the existing evidence. Regarding the issue of hardship, the Federal Court noted that the main argument advanced by the author was related to the risks and adverse country conditions he would allegedly face upon return to Sri Lanka because of the events that had occurred in 2011. The Court noted that the officer had found that the author lacked credibility, given the inconsistencies and contradictions in his evidence and the lack of evidence supporting his claim that he had been involved in the lawsuits following the police attack, that he had provided a declaration to trade union lawyers and that he had filed a complaint after the incident.

8.3 The Federal Court found that in the affidavit filed in support of his application for leave to seek judicial review, the author purported to provide new explanations about his actions following the shooting of his alleged cousin, but that these explanations contradicted his previous statements. The Federal Court also found that there was no evidence on the record to support the author's allegations that he was involved in the lawsuits following the police shooting.

8.4 The State party submits that the author's allegations of risk have been thoroughly assessed by several independent and impartial State party decision-makers, all of whom determined that he has not substantiated the allegations and lacked credibility. The State

[26] "Requests made for [R.C.'s] murder report", TNLRN News Radio online (Sri Lanka), 30 May 2016, available from www.newsradio.lk/235861-2/.

[27] See www.refworld.org/docid/56d05b1315.html.

party considers that the inconsistencies and contradictions contained in the author's file provide the Committee with a strong basis to seriously question his credibility.

From the author

9.1 In additional comments made on 21 April 2017, the author states that the evidence submitted to the Committee on 24 October 2016 (the letters from a member of the trade union and from the author's priest) is critical as it demonstrates that he was instrumental in the legal action that the trade union filed against the police. He claims that this evidence was not taken into account by the officers during the humanitarian and compassionate and pre-removal risk assessment applications. He also explains that the evidence was not considered by the Federal Court as any evidence that has not been previously considered by officers cannot be brought before the Federal Court during the judicial review.

9.2 The author reiterates that documentary evidence is difficult to obtain and notes that, as mentioned in the letter of the trade union official, the Government has not yet issued the committee report which contains evidence regarding the death of his cousin, R.C.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

10.2 The Committee has ascertained, as required by article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement. The Committee notes that the author has exhausted all available domestic remedies, in compliance with the requirements of article 5 (2) (b) of the Optional Protocol.

10.3 The Committee notes the State party's argument that the author's allegations under article 9 (1) are incompatible *ratione materiae* with the Covenant. In that connection, it notes that the author has not provided any information, evidence or explanation of how his rights under article 9 (1) would be violated by the State party through his removal to Sri Lanka in a manner that would pose a substantial risk of irreparable harm such as that contemplated under articles 6 and 7 of the Covenant. The Committee concludes that this part of the communication is inadmissible pursuant to article 3 of the Optional Protocol.

10.4 The Committee notes the State party's argument that the author's allegations under articles 6 (1) and 7 are insufficiently substantiated. However, the Committee is of the view that, for purposes of admissibility, the complainant has provided sufficient information as to the risk of irreparable harm that he would allegedly face in case of return to Sri Lanka. Accordingly, the Committee declares the claim admissible and proceeds with its consideration of the merits.

Consideration of the merits

11.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

11.2 The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by article 7 of the Covenant (para. 12). The Committee has also indicated that the risk must be personal and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm

exists.[28] Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.[29]

11.3 The Committee recalls its jurisprudence, according to which important weight should be given to the assessment conducted by the State party unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice, and that it is generally for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.[30]

11.4 The Committee notes the author's contention that his removal to Sri Lanka would expose him to a risk of irreparable harm, in violation of articles 6 (1) and 7 of the Covenant, because: (a) he provided eyewitness evidence to trade union leaders in the framework of a legal action against the police who, on 30 May 2011, during a demonstration in the "trade zone" area, shot at demonstrators and killed his cousin, R.C.; (b) as a result of his testimony against the police, he received threatening phone calls and was beaten until he lost consciousness by four men who forcibly entered his home; (c) his family continued to receive threatening phone calls after his departure; and (d) as a person returning to Sri Lanka, he would be perceived as a traitor who has discredited Sri Lanka abroad.

11.5 The Committee also notes the State party's argument that the author's allegations of risk have been thoroughly assessed by several independent and impartial State party decision makers who determined that the author had not substantiated the allegations. The Committee particularly notes the pre-removal risk assessment officer's conclusion that the author did not provide sufficient evidence to corroborate his allegations of risk. The Committee also notes the State party's observations that the author's name does not appear in any of the news articles related to the killing of R.C. and the judicial inquiry, and that he did not provide evidence to substantiate that the alleged perpetrator of the incidents on 10 and 28 June 2011 were Sri Lankan government officials or police or that he had provided evidence to the trade union leaders who took legal action against the police.

11.6 In that connection, the Committee notes that on 24 October 2016, the author provided to the Committee a letter from a member of the Free Trade Zone and General Services Employees Union stating that the author's testimony as an eyewitness to the killing of R.C. was key for the legal action filed by the union against the police. He also provided a letter from the priest who conducted the funeral services for R.C. confirming that he was an eyewitness to the killing of R.C. and that many had their lives threatened by unidentified government forces and police. The Committee notes that this evidence was not made available to the pre-removal risk assessment and humanitarian and compassionate officers, as it was obtained after the two processes had terminated. It also notes the author's explanation that this evidence was not considered by the Federal Court, as no new evidence not previously considered by officers can be filed during a judicial review.

11.7 The Committee notes that, while the letters give indications that the author witnessed the killing of his cousin R.C. by the police and that he provided testimony to the union officials for their legal action against the police, they do not provide any information as to the assault that the author allegedly suffered following his presence as a witness at the crime scene of his cousin's death, or that he would be at risk of irreparable harm if he were to be returned to Sri Lanka. The Committee also observes that the author has provided a medical note, according to which he was medically treated from 1 to 7 July 2011 "for his physical injuries due to swelling". However, the Committee considers that this document does not demonstrate that the injuries would necessarily have been provoked by the alleged attack on the author by four unknown men on 28 June 2011. The Committee therefore considers that the author has failed to provide conclusive evidence to substantiate his allegations of risk.

[28] See communications No. 2007/2010, *X. v. Denmark*, Views adopted on 26 March 2014, para. 9.2; and No. 1833/2008, *X. v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

[29] Ibid.

[30] See communications No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4; and No. 1957/2010, *Lin v. Australia*, Views adopted on 21 March 2013, para. 9.3.

11.8 The Committee further notes the assessment of the State party's authorities that the author lacked credibility as he had provided inconsistent and contradictory evidence. It particularly notes the State party's submission that in his May 2012 affidavit, the author did not mention having been present at the Karunyake Free Trade Zone demonstration, having witnessed his cousin's murder or having provided evidence about the murder. The Committee also notes the State party's argument that the author's claim that he witnessed R.C.'s death during the police shootout and that he arranged for an ambulance to take him to hospital but that it was too late and he died is not consistent with the information reported in the media: the press articles submitted by the author indicate that the police took R.C. away in a jeep, but that he was left untreated and bled for two hours in police custody before being taken to the hospital where he died two days later.

11.9 The Committee also notes that the author's statement is neither consistent with the information provided by the Asian Human Rights Commission in the framework of an urgent appeal case concerning the killing of R.C., which states that "after the shooting the injured workers were brought to the Kesselwatte Police Station. They, with [R.C.] amongst them, were kept in the police compound without being afforded medical assistance. The denial of medical assistance to an injured prisoner or suspect constitutes torture under the laws of the country. [R.C] underwent several surgeries in an attempt to save his life but by 7.30 p.m. of 1 June 2011 he had succumbed to his injuries."[31]

11.10 Regarding the author's claim that he is at risk upon return to Sri Lanka as he would be perceived as a traitor who has discredited the country abroad, the Committee, while not underestimating the concerns that may legitimately be expressed with respect to the human rights situation in Sri Lanka, notes that during the internal procedures, the State party's authorities also considered this possible risk and is of the view that, in the present case, the State party's authorities gave appropriate consideration to the author's claims.

11.11 In the light of the above, the Committee cannot conclude that the information before it shows that the author will face a real risk of treatment contrary to articles 6 (1) and 7 of the Covenant if he were removed to Sri Lanka.

12. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the removal of the author to Sri Lanka would not violate his rights under articles 6 (1) and 7 of the Covenant.

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[31] Asian Human Rights Commission, "Sri Lanka: denial of prosecuting the police officers responsible for killing of FTZ worker destroys faith in the country's legal system", urgent appeal case AHRC-UAC-184-2011, 30 September 2011, available from www.humanrights.asia/news/urgent-appeals/AHRC-UAC-184-2011/?searchterm=roshanchanaka.